

Aug 06, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JESSE ERVIN,

Plaintiff,

v.

MOUNTAIN VIEW EQUIPMENT
COMPANY, an Idaho corporation,
and STUART FJELDSTED and his
marital property,

Defendants.

NO: 1:18-CV-3226-RMP

PROTECTIVE ORDER

BEFORE THE COURT is a Joint Motion for Stipulated Protective Order by Plaintiff Jesse Ervin and Defendants Mountain View Equipment Company and Stuart Fjeldsted, ECF No. 8. A district court may issue protective orders regarding discovery upon a showing of good cause. Fed. R. Civ. P. 26(c). Before issuing a stipulated protective order, a district court judge should ensure that the protective order's restrictions do not infringe on the public's general right to inspect and copy judicial records and documents. *See Kamakana v. City and Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006).

1 Having reviewed the protective order and the remaining record, the Court finds good
2 cause to grant the joint motion and enter the agreed-upon protective order.
3 Accordingly, **IT IS HEREBY ORDERED** that the parties' motion for entry of a
4 stipulated protective order, **ECF NO. 8**, is **GRANTED**. The protective order in
5 effect is set forth below.

6 **STIPULATED PROTECTIVE ORDER**

7 1. **PURPOSES AND LIMITATIONS**

8 Discovery in this action is likely to involve production of confidential,
9 proprietary, or private information for which special protection may be warranted.

10 Accordingly, the parties hereby stipulate to and petition the court to enter the
11 following Stipulated Protective Order. The parties acknowledge that this
12 agreement is consistent with Fed. R. Civ. P. Rule 26(c). It does not confer blanket
13 protection on all disclosures or responses to discovery, the protection it affords
14 from public disclosure and use extends only to the limited information or items that
15 are entitled to confidential treatment under the applicable legal principles, and it
16 does not presumptively entitle parties to file confidential information under seal.

17 2. **"CONFIDENTIAL" MATERIAL**

18 "Confidential" material may include the following documents and tangible
19 things produced or otherwise exchanged: (1) all documents contained in employee
20 personnel files, including but not limited to personal information, performance
21 evaluations, corrective actions, letters of commendation or reprimand,

1 investigations, reports, theories, legal opinions, salary or pay information,
2 performance evaluations, sick and vacation leave hours, personal financial records,
3 medical records, written or recorded internal communications and memorandums,
4 employment policies, and employee training manuals, (2) any business records,
5 final documents, customer lists, client/customer information, and any other private,
6 proprietary information in party's possession that is not generally available to
7 employees or the public. The parties agree that a "Confidential" designation does
8 not waive a party's right to challenge that designation. The parties also agree that
9 the definition of "confidential" material contained in this paragraph does not limit
10 a party's right to designate other documents or materials that are not specifically
11 enumerated herein.

12 3. SCOPE

13 The protections conferred by this agreement cover not only confidential
14 material (as defined above), but also (1) any information copied or extracted from
15 confidential material; (2) all copies, excerpts, summaries, or compilations of
16 confidential material; and (3) any testimony, conversations, or presentations by
17 parties or their counsel that might reveal confidential material. To the extent that
18 testimony is deemed confidential in any testimony, that designation must be
19 affirmatively asserted, consistent with paragraph 5.2(b) below.
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1 However, the protections conferred by this agreement do not cover
2 information that is in the public domain or becomes part of the public domain
3 through trial or otherwise.

4 4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

5 4.1 Basic Principles. A receiving party may use confidential material
6 that is disclosed or produced by another party or by a non-party in connection with
7 this case only for prosecuting, defending, or attempting to settle this litigation.
8 Confidential material may be disclosed only to the categories of persons and under
9 the conditions described in this agreement. Confidential material must be stored
10 and maintained by a receiving party at a location and in a secure manner that
11 ensures that access is limited to the persons authorized under this agreement.

12 4.2 Disclosure of “CONFIDENTIAL” Information or Items.

13 Unless otherwise ordered by the court or permitted in writing by the
14 designating party, a receiving party may disclose any confidential material only to:

15 (a) the receiving party’s counsel of record in this action, as well as
16 employees of counsel to whom it is reasonably necessary to disclose the
17 information for this litigation;

18 (b) the officers, directors, and employees (including in-house
19 counsel) of the receiving party to whom disclosure is reasonably necessary for this
20 litigation, unless the parties agree that a particular document or material produced
21 is for Attorneys’ Eyes Only and is so designated;

1 (c) experts and consultants to whom disclosure is reasonably
2 necessary for this litigation and who have signed the “Acknowledgment and
3 Agreement to Be Bound” (Exhibit A);

4 (d) the Court, court personnel, and court reporters and their staff;

5 (e) copy or imaging services retained by counsel to assist in the
6 duplication of confidential material, provided that counsel for the party retaining
7 the copy or imaging service instructs the service not to disclose any confidential
8 material to third parties and to immediately return all originals and copies of any
9 confidential material;

10 (f) during their depositions, witnesses in the action to whom
11 disclosure is reasonably necessary and who have signed the “Acknowledgment and
12 Agreement to Be Bound” (Exhibit A), unless otherwise agreed by the designating
13 party or ordered by the court. Pages of transcribed deposition testimony or
14 exhibits to depositions that reveal confidential material must be separately bound
15 by the court reporter and may not be disclosed to anyone except as permitted under
16 this agreement;

17 (g) the author or recipient of a document containing the
18 information or a custodian or other person who otherwise possessed or knew the
19 information.

20 (h) each such attorney agrees that there will be no further
21 disclosure of Confidential Information beyond what is permitted in this Order.

1 4.3 Filing Confidential Material. Before filing confidential material or
2 discussing or referencing such material in court filings, the filing party shall confer
3 with the designating party to determine whether the designating party will remove
4 the confidential designation, whether the document can be redacted, or whether a
5 motion to seal or stipulation and proposed order is warranted. Local Civil Rule
6 5(g) sets forth the procedures that must be followed and the standards that will be
7 applied when a party seeks permission from the court to file material under seal.

8 5. DESIGNATING PROTECTED MATERIAL

9 5.1 Exercise of Restraint and Care in Designating Material for Protection.

10 Each party or non-party that designates information or items for protection under
11 this agreement must take care to limit any such designation to specific material that
12 qualifies under the appropriate standards. The designating party must designate for
13 protection only those parts of material, documents, items, or oral or written
14 communications that qualify, so that other portions of the material, documents,
15 items, or communications for which protection is not warranted are not swept
16 unjustifiably within the ambit of this agreement. By designating materials as
17 Confidential, the Designating Party and its counsel represent that they have a good
18 faith belief that the materials so designated contain sensitive, non-public,
19 confidential information.

20 Mass, indiscriminate, or routinized designations are prohibited.
21 Designations that are shown to be clearly unjustified or that have been made for an

1 improper purpose (*e.g.*, to unnecessarily encumber or delay the case development
2 process or to impose unnecessary expenses and burdens on other parties) expose
3 the designating party to sanctions.

4 If it comes to a designating party's attention that information or items that it
5 designated for protection do not qualify for protection, the designating party must
6 promptly notify all other parties that it is withdrawing the mistaken designation.

7 5.2 Manner and Timing of Designations.

8 Except as otherwise provided in this agreement (see, *e.g.*, second paragraph
9 of section 5.3 below), or as otherwise stipulated or ordered, disclosure or discovery
10 material that qualifies for protection under this agreement must be clearly so
11 designated when the material is disclosed or produced.

12 (a) Information in documentary form: (*e.g.*, paper or electronic
13 documents and deposition exhibits, but excluding transcripts of depositions or
14 other pretrial or trial proceedings), the designating party must affix the word
15 "CONFIDENTIAL" to each page that contains confidential material. If only a
16 portion or portions of the material on a page qualifies for protection, the producing
17 party also must clearly identify the protected portion(s) (*e.g.*, by making
18 appropriate markings in the margins).

19 (b) Testimony given in deposition or in other pretrial proceedings:
20 the parties and any participating non-parties must identify on the record, during the
21 deposition or other pretrial proceeding, all protected testimony, without prejudice to

1 their right to so designate other testimony after reviewing the transcript. Any party or
2 non-party may, within fifteen days after receiving the transcript of the deposition or
3 other pretrial proceeding, designate portions of the transcript, or exhibits thereto, as
4 confidential. If a party or non-party desires to protect confidential information at
5 trial, the issue should be addressed during the pre-trial conference.

6 (c) Other tangible items: the producing party must affix in a
7 prominent place on the exterior of the container or containers in which the
8 information or item is stored the word "CONFIDENTIAL." If only a portion or
9 portions of the information or item warrant protection, the producing party, to the
10 extent practicable, shall identify the protected portion(s).

11 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent
12 failure to designate qualified information or items does not, standing alone, waive
13 the designating party's right to secure protection under this agreement for such
14 material. Upon timely correction of a designation, the receiving party must make
15 reasonable efforts to ensure that the material is treated in accordance with the
16 provisions of this agreement.

17 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

18 6.1 Timing of Challenges. Any party or non-party may challenge a
19 designation of confidentiality at any time. Unless a prompt challenge to a
20 designating party's confidentiality designation is necessary to avoid foreseeable,
21 substantial unfairness, unnecessary economic burdens, or a significant disruption

1 or delay of the litigation, a party does not waive its right to challenge a
2 confidentiality designation by electing not to mount a challenge promptly after the
3 original designation is disclosed.

4 6.2 Meet and Confer. The parties must make every attempt to promptly
5 resolve any dispute regarding confidential designations without court involvement.
6 Any motion regarding confidential designations or for a protective order must
7 include a certification, in the motion or in a declaration or affidavit, that the
8 movant has engaged in a good faith meet and confer conference with other affected
9 parties in an effort to resolve the dispute without court action. The certification
10 must list the date, manner, and participants to the conference. A good faith effort to
11 confer requires a face-to-face meeting or a telephone conference. The parties agree
12 to meet and confer within five business days of a parties' challenge to a
13 confidentiality designation.

14 6.3 Judicial Intervention. If the parties cannot resolve a challenge without
15 court intervention, the Designating party may file and serve a motion to retain
16 confidentiality under Local Civil Rule 7 (and in compliance with Local Civil Rule
17 5(g), if applicable). Failure to bring a motion under Local Civil Rule 7 within five
18 business days of the meet and confer regarding the material constitutes a waiver of
19 the confidential designation. This agreement shall not limit the rights of the
20 Requesting Party from bringing a motion to seal, in the alternative.

1 The burden of persuasion in any such motion shall be on the designating
2 party. Frivolous challenges, and those made for an improper purpose (e.g., to
3 harass or impose unnecessary expenses and burdens on other parties) may expose
4 the challenging party to sanctions. All parties shall continue to maintain the
5 material in question as confidential until the court rules on the challenge.

6 7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED
7 IN OTHER LITIGATION

8 If a party is served with a subpoena or a court order issued in other litigation
9 that compels disclosure of any information or items designated in this action as
10 “CONFIDENTIAL,” that party must:

11 (a) promptly notify the designating party in writing and include a
12 copy of the subpoena or court order;

13 (b) promptly notify in writing the party who caused the subpoena
14 or order to issue in the other litigation that some or all of the material covered by
15 the subpoena or order is subject to this agreement. Such notification shall include a
16 copy of this agreement; and

17 (c) cooperate with respect to all reasonable procedures sought to be
18 pursued by the designating party whose confidential material may be affected.

19 8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

20 If a receiving party learns that, by inadvertence or otherwise, it has disclosed
21 confidential material to any person or in any circumstance not authorized under
this agreement, the receiving party must immediately (a) notify in writing the

1 designating party of the unauthorized disclosures, (b) use its best efforts to retrieve
2 all unauthorized copies of the protected material, (c) inform the person or persons
3 to whom unauthorized disclosures were made of all the terms of this agreement,
4 and (d) request that such person or persons execute the “Acknowledgment and
5 Agreement to Be Bound” that is attached hereto as Exhibit A.

6 9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE
7 PROTECTED MATERIAL

8 When a producing party gives notice to receiving parties that certain
9 inadvertently produced material is subject to a claim of privilege or other
10 protection, the obligations of the receiving parties are those set forth in Federal
11 Rule of Civil Procedure 26(b)(5)(B). This provision is not intended to modify
12 whatever procedure may be established in an e-discovery order or agreement that
13 provides for production without prior privilege review. The parties agree to the
14 entry of a non-waiver order under Fed. R. Evid. 502(d) as set forth herein.

15 10. TERMINATION AND RETURN OF DOCUMENTS

16 Within 60 days after the termination of this action, including all appeals,
17 each receiving party agrees to destroy all confidential material.

18 Notwithstanding this provision, counsel are entitled to retain one archival
19 copy of all documents filed with the court, trial, deposition, and hearing transcripts,
20 correspondence, deposition and trial exhibits, expert reports, attorney work
21 product, and consultant and expert work product, even if such materials contain
confidential material.

1 The confidentiality obligations imposed by this agreement shall remain in
2 effect until a designating party agrees otherwise in writing or a court orders
3 otherwise.

4 **IT IS FURTHER ORDERED** that, pursuant to Fed. R. Evid. 502(d), the
5 production of any documents in this proceeding shall not, for the purposes of this
6 proceeding or any other proceeding in any other court, constitute a waiver by the
7 producing party of any privilege applicable to those documents, including the
8 attorney-client privilege, attorney work-product protection, or any other privilege
9 or protection recognized by law.

10 The District Court Clerk is directed to enter this Order and provide copies to
11 counsel.

12 **DATED** August 6, 2019.

13 *s/ Rosanna Malouf Peterson*
14 ROSANNA MALOUF PETERSON
15 United States District Judge
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